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THE ARCHITECTURE OF THE ESTABLISHMENT CLAUSE

JOHN H. GARVEY[†]

Professor Sedler's review of Establishment Clause law covers a lot of ground. It would be interesting, and useful, for me to consider how we agree (or sometimes disagree) about each of the issues he discusses. But I am going to focus on the design rather than the details. Here I find something that I like a lot. There is a tendency among experts in First Amendment law to look for unified theories. This is a phenomenon that you have probably observed in discussions of free speech. It is no less true of the Establishment Clause. Professor Sedler, having taken what he calls "the perspective of constitutional litigation,"¹ avoids this tendency, and I think his review is the better for it.

His beginning is inauspicious. He starts by saying that Establishment Clause law is governed by one overriding principle—complete official neutrality.² He then sets out three operational principles—purpose, effect, and entanglement—which, we are to suppose, can be derived from the overriding principle.³ Below the operational principles, in particular the second, there are a number of subsidiary doctrines—primary effect, secular deism, endorsement, etc.⁴ Sedler's organization once again suggests that we can deduce or extrapolate these third-level rules from the operational principles on the second level. Finally, on the fourth level, we have precedents—particularized interpretations of the rules immediately above them.⁵

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1. Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 WAYNE L. REV. 1317, 1322 (1997).

2. See *id.* at 1338-39.

3. See *id.* at 1343-51.

4. See *id.* at 1351-59.

5. See *id.* at 1359-65.

But Professor Sedler is too good a lawyer to believe that he could bring off this feat of deduction successfully. He keeps dropping hints that he has built his theory from the ground up rather than from the top down. The overriding principle, he says, "does not provide much guidance in determining whether or not a particular governmental practice . . . violates the Establishment Clause."⁶ The operational principles likewise are "not a talismanic test or even a comprehensive mode of analysis that by itself can be used to resolve all Establishment Clause issues arising in practice."⁷ He criticizes "academic commentators" for failing "to understand or accept the limited scope of the test in actual litigation."⁸ Even the subsidiary doctrines are less important than the precedents on the ground level. "The precedents are more important . . . because they are more directly relevant to the analysis of the particular governmental action that is at issue. . . . The Court's precedents have been the primary factor in the development of each of the different areas of Establishment Clause law."⁹

If I am reading him right, then, Sedler thinks that the law of the Establishment Clause is irreducibly complex. It cannot be captured in a single test or theory. This is a proposition that I agree with. I want to develop this idea a bit to show how and why it is that way.

I will begin with a brief discussion of free speech law—an area where academics have also succumbed to the allure of reductionism, but where I think we have begun to overcome it. When I began teaching in this area, every respectable academic had his or her own theory of freedom of speech. They would say that we protect freedom of speech because it serves some important value, like truth; and that we can best serve this value by observing an omnibus rule for all speech cases. The clear-and-present-danger test was a popular attempt in the 1940s and 1950s. Thomas Emerson's speech-conduct rule was fashionable in the 1960s and 1970s.¹⁰ I

6. *Id.* at 1340-41.

7. *Id.* at 1343.

8. *Id.* at 1344.

9. *Id.* at 1359-60.

10. See THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION

won't say we have cured this tendency in the last decade, but most people understand that First Amendment problems are more complicated than that.¹¹ The speech clause serves a number of values—it helps us pursue knowledge, it makes democracy work, it teaches us tolerance, it is a means of self-expression, and so on. This is one reason why one rule can't do all the work that the speech clause is designed for.

The other is this. The right to freedom is a complicated relationship among four variables. Freedoms, unlike other rights, are rights to *do* things—to speak, to worship, to have children. Let us call this variable *x*. This right to do *x*, though, does not mean the same thing for every claimant. Little children and retarded people don't have voting rights. Speech may have a different value for a corporation than it does for an individual. Let us call this variable—the actor—*X*. Third, the right to freedom is not only a freedom *to*, it is also a freedom *from*. This means that the government may not impose constraints on our doing *x*. This is a feature that constitutional lawyers tend to ignore, though I am not sure why. When the government regulates speech, it matters what kind of constraint it imposes. It is very difficult to justify a license (a prior restraint). It is pretty hard to impose a criminal penalty. It is easier to get away with a tax (and among taxes, easier to explain an income tax rather than a license tax). We have still other rules for denial of benefits—like income tax exemptions and federal funds. Let us call this variable—the type of constraint—*y*. Finally, just as it matters who is doing the speaking (*X*), so it matters who is imposing the constraint. We might want to have different rules for state and federal governments, or for judges and legislators, or for

(1971).

11. The most influential proponent of this point has been Frederick Schauer. See, e.g., JOHN H. GARVEY & FREDERICK SCHAUER, *THE FIRST AMENDMENT: A READER* (2d ed. 1996); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181 (1988); Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981).

the various private actors who get caught up in the rubric of state action. Let us call this variable *Y*. In short, then, freedom of speech is a relation of two actors and two actions: a private actor who speaks (*X*, *x*) and a government actor who imposes a constraint (*Y*, *y*).¹² A change in any one of these variables can produce a different outcome.

Let us turn from the reasons for the complexity to the rules themselves. First are what we call definitional problems. These arise whenever we use a text to limit the power of government: we must decide what are the borders of the categories of protected acts (*x*) and forbidden constraints (*y*). The First Amendment forbids Congress to abridge the freedom of speech.¹³ But what do we mean by "speech"? It obviously excludes lawnmowing. But it also excludes perjury and obscenity. Those are "speech" in the ordinary language sense, but not in the technical First Amendment sense. We use one test (the *Miller* test) to define the boundary between speech and obscenity;¹⁴ we use another for perjury.¹⁵ And what do we mean by "abridge"? Does this include denial of funding by the NEA—the problem we call unconstitutional conditions? Cases presenting definitional problems like these require us to think in the most basic way about the values served by the First Amendment.

After definitional questions we come to the level of genuine free speech problems. These are not all governed by the same rule—say, something like the clear-and-present-danger test. In the first place, different kinds of speech (*x*) create different kinds of problems. Commercial advertising, defamation, and child pornography threaten different harms than seditious speech, and the clear and present danger test is not well adapted to our concerns with them. As Fred Schauer has said, "We are accustomed to thinking in terms of *levels* of protection, but it may be that different categories of

12. I explain this in more detail in JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996).

13. See U.S. CONST. amend. I, cl. 2.

14. See *Miller v. California*, 413 U.S. 15 (1973).

15. See Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645.

speech should be treated *differently*, which does not necessarily entail more or less.¹⁶ In the cases I mentioned we have not one but three rules: for commercial speech the four-part *Central Hudson* rule,¹⁷ for defamation the rule of *New York Times v. Sullivan*,¹⁸ and for child pornography the rule of *New York v. Ferber*.¹⁹

Suppose we stick with one category of speech. We will also get different rules for different types of speakers (X). When the speaker is a child, the rules will be different than they would be for an adult. Compare the rule in *Tinker v. Des Moines Independent Community School District*²⁰ for disruptive political speech with the rule in *Brandenburg v. Ohio*.²¹ Or the rule in *Hazelwood School District v. Kuhlmeier*²² about control of student newspapers with the rule in *Near v. Minnesota*.²³ When the speaker is the government itself we still have another set of rules.²⁴

Suppose now that we hold steady both the type of speech and the kind of speaker. We will once again get different results in cases involving different constraints (y). Courts ask, for example, about the purpose of the government's action. There is a very strong rule against regulating speech on account of its content. (This rule is further subdivided into rules against viewpoint and subject matter regulation.) There is a more relaxed rule (the *O'Brien* rule) for regulations unrelated to content.²⁵ We sometimes refer to these as track one and track two in the main body of First Amendment

16. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 287 (1981).

17. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

18. 376 U.S. 254 (1964). It is, of course, supplemented by a host of different rules for cases involving private (rather than public) figures and matters of private (rather than public) concern.

19. 458 U.S. 747 (1982).

20. 393 U.S. 503 (1969).

21. 395 U.S. 444 (1969).

22. 484 U.S. 260 (1988).

23. 283 U.S. 697 (1931).

24. See MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* 213-99 (1983).

25. See *United States v. O'Brien*, 391 U.S. 367 (1968).

analysis.²⁶ Then there are different rules keyed not to the purpose but to the procedure or technique employed by the government. I have already mentioned the rule against prior restraints. There are also overbreadth and vagueness rules, the *Freedman* due process rules,²⁷ and so on. Taxes are treated differently than fines. The denial of benefits is a whole different problem.

Finally, we sometimes have different rules for different government actors (Y). Professor Redish argues that the rule against prior restraints should apply to administrative agencies but not to courts.²⁸ The rule against overbreadth is directed at legislatures.²⁹ The rule protecting handbills applies to company towns but not to shopping centers.³⁰

I think I have said enough to get my point across. The various rules I have mentioned are irreducibly independent. They cannot be collapsed one into another, or subsumed under some meta-rule. The law here is *necessarily* complex—because the right is a complicated relation among four variables, and because we hope to promote a number of different values through constitutional management of that relationship.

Let me turn now from the Free Speech Clause to the Establishment Clause, whose architecture is my principal concern. This clause too implicates a number of values:

- I believe that an establishment of my church would be bad because it would corrupt my church.

26. See *id.*; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 791 (2d ed. 1988). The *O'Brien* rule is presently used in two kinds of cases that we once distinguished from one another, but no longer do: symbolic speech cases, and time, place, and manner cases. See Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991).

27. See *Freedman v. Maryland*, 380 U.S. 51 (1965).

28. See Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

29. See *Osborne v. Ohio*, 495 U.S. 913 (1990); *Massachusetts v. Oakes*, 491 U.S. 576 (1989).

30. See *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Marsh v. Alabama*, 326 U.S. 501 (1946).

- An establishment of your church would be bad because it could lead to defections from mine.

These are both religious values protected by the clause.

- An establishment of your church might have pernicious feedback effects on the government of our political society.³¹
- An establishment of anyone's church could have undesirable side effects, like causing civil discord.

These are secular values that an established church might threaten. I might add that the (or an) historical objective of the Establishment Clause may have been to serve another secular value:

- To promote the cause of federalism by keeping the federal government from interfering with state establishments.

Let me clarify one point about the values I have mentioned. In our society people hold a variety of opinions about religion, and they disagree *with each other* about the purposes of the Establishment Clause. But in speaking about a multiplicity of values I am not referring to this kind of variety. It undoubtedly has an effect on the law. Bargains made in a pluralist society will usually give each group something of what it wants, and the whole scheme may have a kind of grab bag appearance—a building designed by a committee. But the values I have mentioned are all ones that *I myself* hold. This means that I might find it impossible to design a

31. Consider the government of the Islamic Republic of Iran. In accordance with (one version of) shi'ite principles of Islamic law, article 5 of the constitution makes a clerical jurist the Leader of the Islamic Republic. See Said Amir Arjomand, *Shi'ite Jurisprudence and Constitution Making in the Islamic Republic of Iran*, in MARTIN E. MARTY & R. SCOTT APPLEBY, *FUNDAMENTALISMS AND THE STATE* 88 (1993).

In making this point I say "an establishment of *your* church" because I may believe that mine could do a good job.

simple structure even if I could ignore what you all think.

The harms that I have mentioned do not all result from the same causes, nor do they call for reactions of the same type and intensity. Christmas crèches and high school graduation prayers are far removed from the secular harms I have mentioned.³² Such observances are more likely to cause religious harm, at least when they are run by the government. This may call for one kind of rule designed to protect churches. Allowing religious ministers to serve in the legislature poses a threat to the first of the secular values I mentioned. But forbidding them to serve creates a religious test for office that discourages membership in the clergy. Here we must choose a rule that balances these two concerns and cannot satisfy them both.

One cause of Establishment Clause complexity, then, is that the clause is designed to serve a number of objectives. Different ones come into play at different times. And sometimes there is tension among them. The other chief cause of complexity is that the rule of nonestablishment, like the Free Speech Clause, is a relationship among several variables. There is an important difference. Freedom of speech is a relation of four variables—it gives some individual or group (*X*) a right to do some speech-act (*x*), and forbids the government (*Y*) to interfere by imposing various kinds of constraints (*y*).³³ It is often not clear in establishment cases who is playing the role of *X*. Or to put it doctrinally, standing is sometimes a problem.³⁴ The Establishment Clause also does not single out a particular kind of private act (*x*), like speech, for

32. I do not pretend that my list is exhaustive. There may be *other* secular harms that I have not listed. I have simplified for the sake of making my larger point.

33. The free exercise of religion has the same four-part structure. Other rights that are not freedoms—like the privilege against self-incrimination or the right to a jury trial—are relations of three variables (*X,Y,y*). They do not give claimants a right to do any particular act (*x*); they only forbid (or command) the government to act in specific ways.

34. See *Valley Forge College v. Americans United*, 454 U.S. 464 (1982); *Flast v. Cohen*, 392 U.S. 83 (1968); *Abington School Dist. v. Schempp*, 374 U.S. 203, 224 n.9 (1963).

protection. It only speaks of the government's behavior (Y, y). This might seem to make for a simpler jurisprudence than in free speech cases but it doesn't—only vaguer.

Let us turn to the rules themselves and observe the complexity at first hand. As with free speech, we begin with definitional questions. (What is "religion"?) Can the public schools teach transcendental meditation? Secular humanism? *Lemon v. Kurtzman*³⁵ cannot answer these questions because it presupposes an understanding of what we mean by religion. (It asks whether the purpose or primary effect of a law is "religious.") Kent Greenawalt says that the right rule is an analogical approach—look for family resemblances between the practice in question and clear cases.³⁶

Once we are clearly inside the borders of the Establishment Clause, some say *Lemon* solves all our problems. It doesn't. This is partly because the Establishment Clause creates a complex relation. I said that in free speech cases the rules vary with the nature of the speaker (X). There is no exact counterpart to this role in Establishment Clause law. As I have said, it does not focus on a particular actor (X) or a particular kind of private action (x). This does not mean that no one benefits from the Establishment Clause. But the constituencies it serves are large and ill-defined: churches, individual believers, taxpayers, citizens, the states. In making decisions about standing (who can be a plaintiff) we, perhaps unwittingly, define and weigh the values I mentioned a moment ago. Can taxpayers sue the government for giving aid to parochial schools? That depends on whether having your money spent on a religion you don't believe is a cognizable Establishment Clause harm. Can kids sue public schools for sponsoring voluntary prayer in class? That depends on how the kids are harmed.

Establishment Clause cases are in this regard more like separation of powers or federalism cases. Those principles also serve large constituencies, and the jurisprudence in each area is messy.

35. 403 U.S. 602 (1971).

36. See Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984).

There is a lot of "balancing" in separation of powers law,³⁷ and some in federalism cases.³⁸ We also have a number of flat rules: you can't sue the president for things he does in office; Congress can't exercise a legislative veto; states can't discriminate against interstate commerce.³⁹ This is about what we would expect when there are a lot of players, some of them are institutions, and some are not before the court—they fit together in a cumbersome way.

We have been talking about the complexity that occurs because the Establishment Clause protects a number of large (and competing) constituencies. This is not the exact counterpart of X in free speech law, but it is like it. The Establishment Clause does speak directly to the government about what it can and can't do (Y, y). It says that "Congress shall make no law respecting an establishment of religion."⁴⁰ There is good reason to believe that the word "Congress" means exactly what it says—that it was designed to keep the federal legislature (Y) from meddling in states' religious affairs.⁴¹ If that were so, it would function like a limited-purpose Tenth Amendment, allocating authority over a particular subject matter within the federal system. (And of course, the Fourteenth Amendment would no more "incorporate" that division of authority to limit state power than it would incorporate the Tenth Amendment.) This is actually how things stood until 1947, when *Everson v. Board of Education* first applied the Establishment Clause to the states.⁴² There is no point in reopening this debate; the Supreme Court has said it won't reconsider it.⁴³ But the fact that we

37. See *Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977); *Yakus v. United States*, 321 U.S. 414 (1944).

38. We did it during the reign of *National League of Cities v. Usery*, 426 U.S. 833 (1976). We do it to measure the commerce powers of the states.

39. See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983); *New Jersey-Philadelphia Presbytery v. New Jersey*, 469 U.S. 1107 (1985).

40. U.S. CONST. amend. I, cl. 1.

41. See STEVEN D. SMITH, *FOREORDAINED FAILURE* (1995).

42. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

43. See *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985).

have hijacked the clause from its original function and put it to other uses helps to explain why we have had trouble reducing it to a single rule.

Here is another point about *Y* that we tend to overlook. In free speech law the obligation to obey the First Amendment is sometimes extended to private parties, when they perform a public function, or when they engage in some joint venture with the government.⁴⁴ The same thing happens under the Establishment Clause, though here we treat it as a question about the merits rather than state action. The parochial school aid cases hold that private schools must obey the command of the Establishment Clause if they receive government money—because they are engaged in a joint venture with the government, they are subject to the First Amendment rule against conducting religious practices. They can of course give the money up and continue their observances as private actors, and this is what the schools all do; but if they want to continue to participate in the program they must give up their faith. There is an elaborate set of rules about what kind of connection will subject private institutions to this choice.⁴⁵

The chief cause of complexity in Establishment Clause law is the one I have saved for last. It concerns the varieties of forbidden governmental action (*y*). Efforts at simplifying the law usually concentrate on formulating a rule to govern this point—*Lemon* looks at the purposes and effects of government action; Justice O'Connor's endorsement test and Justice Kennedy's coercion test also focus on how the government has behaved. None of these reductionist efforts has been successful.

The reason for this is that the forms and occasions of government action are infinitely varied. I will say a few words about each of these points. First as to what I have called the occasions of government action. I am currently at work with a few

44. *Marsh v. Alabama*, 326 U.S. 501 (1946), is an example of the public function theory. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), is an example of the joint venture theory, though there the Court rejected the claim.

45. See John Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61.

friends on a casebook about religion and the Constitution. The usual arrangement of materials for such books is doctrinal: they teach the history of the Establishment Clause, then half a dozen applications, then the Free Exercise Clause. In our book we have arranged the materials into three large groups of real world problems: religion in a regulatory state; the government's pervasive influence over culture; and government funding. Each of these areas has its own distinctive set of problems and array of solutions. The regulation cases focus on the problem of religious exemptions (Are they required? permitted?). The culture cases have a lot of parallels in free speech law (content regulation, public forum, government speech). The funding cases have their own set of rules, and they are very much in flux at the moment.

The point I want to illustrate with this brief sales pitch is this. The *Lemon* test has been criticized in every one of its parts. But to my mind the most serious mistake made with *Lemon* has been in trying to adapt a test about school funding to disputes about crèches, monkey laws, and tax exemptions. The same goes for *Lemon*'s main competitors. Justice O'Connor formulated her endorsement test in a case about crèches—a case where the government behaves as a speaker proclaiming a particular message. It is not easy to transpose this idea to the context of school funding or zoning laws. Justice Kennedy proposed a coercion test in *Lee v. Weisman*,⁴⁶ a school prayer case where we worry about forcing kids to pray. Try transposing this idea to crèches and school aid. As Professor Schauer said about speech law, even if we want the same *level* of protection in all Establishment Clause cases, it may be that cases involving different categories of establishment should be treated *differently*, which does not necessarily mean more or less.

Let me now explain what I mean by the "forms" of government action. In dealing with the real world situations I have described, the government has any number of options—tax, regulate, punish, encourage. Suppose Minnesota passes a law to regulate charitable solicitation that applies to some religious groups but not others.

46. 505 U.S. 577 (1992).

This will run afoul of the rule against denominational preferences—"[t]he clearest command of the [E]stablishment [C]lause."⁴⁷ It is the Establishment Clause counterpart to the rule against content discrimination—track one in free speech law. In each case the Court looks at the law with strict scrutiny. Even in the heyday of *Lemon v. Kurtzman*⁴⁸ the Court recognized that *Lemon* only applies "to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions."⁴⁹ Those are subject to a stricter rule.

Lots of states have laws that require businesses to close on Sunday. These facilitate church attendance, but the Supreme Court has nevertheless held that they are constitutional.⁵⁰ Suppose that Virginia went one step further and required people to attend church.⁵¹ This would certainly be unconstitutional. In fact, I can think of no chain of events or reasons that would save it. The rule against coerced belief, unlike the rule against denominational preferences, is absolute. There is no point in talking about compelling state interests or the lack of alternatives.⁵²

Contrast these cases of discrimination and coercion with ones

47. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

48. 403 U.S. 602 (1971).

49. *Larson*, 456 U.S. at 252 (footnote omitted).

50. See *McGowan v. State of Maryland*, 366 U.S. 420 (1961).

51. Virginia actually did this at one point in its history. See SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 78 (1902).

52. Compare *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), where the Court declared the following:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 642.

I think this is the most important difference between school prayer and Christmas crèches. No one denies that if a school forces children to pray, its action is unconstitutional. The real fight in cases like *Lee v. Weisman*, 505 U.S. 577 (1992), is over whether there is coercion. If the Court finds it, the case is over.

where the government hands out money. This kind of behavior, unlike the first two, is not automatically unconstitutional. Whether it is OK or not depends on how the program is set up: who are the recipients—individuals or institutions? How large is the recipient class? Is it a categorical or a block grant?

I wish to add one final word about my general approach to these cases. In saying that Establishment Clause law is necessarily complex I do not mean to imply that the whole thing is a hopeless muddle. Nor do I mean to suggest that the appropriate solution for all this complexity is one gigantic balancing test which we should trust the courts to apply to individual cases. That is an approach that Justice O'Connor has preached in recent years, but it is not mine. We have rejected balancing as a methodology in much of free speech law, partly because it is unpredictable and partly because it does not afford strong protection. I fear the same results under the Establishment Clause. It may be that the right response to the complexity I have described is to have a lot of rules: one about coerced belief, one about denominational preferences, one about accommodation,⁵³ one about resolving church schisms,⁵⁴ one about preaching in public forums, several about government funding, etc. Some, like the first two, could be flat rules. Some would not. I don't want to give away the story of our book. But I have said enough to show why I think that Professor Sedler is on the right track.

53. See *Texas Monthly v. Bullock*, 489 U.S. 1 (1989).

54. See *Jones v. Wolf*, 443 U.S. 595 (1979); *Watson v. Jones*, 80 U.S. 679 (1871).